



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

MISCELLANY.

GAGGING OBSTREPEROUS PRISONERS IN COURT.—The *Solicitors' Journal* (London) of October 19, 1901, contains the following item of a trial recently held in England:

"An extraordinary scene occurred at the West Riding Quarter Sessions, held at Wakefield, on Monday. A prisoner indicted for horse stealing, on entering the dock, commenced to shout and abuse the members of the court and otherwise act in a most violent and noisy manner. A plea of not guilty having been extracted from him with some difficulty, he continued shouting with such persistence that it was quite impossible for the case to be heard. He was therefore taken down to be medically examined. Later in the day, the doctor having reported that he was of sound mind, the case was proceeded with. The prisoner again created such a disturbance that no other voice could be heard in court. It being absolutely impossible to go on otherwise, he was gagged and handcuffed while the evidence was given, and eventually received a sentence of seven years' penal servitude. He utilized every opportunity which was afforded him to renew his violent conduct, and refused to address the court or the jury. As it was a charge of felony the court would not send the prisoner down, it being pointed out that, according to Archbold, no trial for felony can be had except in the presence of the prisoner. The reason for this is stated to be that he is given in charge to the jury. A charge of misdemeanor may be tried, although the accused be not present, if he has previously pleaded. In a case before Wills, J. (*R. v. Berry*, 104 L. T. J. 110), it is stated that if a prisoner creates a disturbance the trial may go on in his absence. In the absence of any direct ruling as to a charge of felony, it can hardly be suggested that in the *West Riding* case the action of the Bench was not, at least, the outcome of common sense, though objection might be taken to the fact that the prisoner's opportunities for cross-examination were somewhat limited. If a prisoner may not be subjected to restraint, it would be possible for any accused person by violent conduct to delay his trial almost indefinitely."

We, of course, approve of the action of the trial judge on the score of common sense and believe it to have been legally justifiable. The trial being for felony, it certainly was more prudent, if not actually indispensable, that the prisoner, being of sound mind, should be present. It also appears, inferentially, that the gag was removed from time to time so as to give the prisoner the chance of being treated in the usual manner of persons accused of crime, which opportunity he systematically abused. The court was thus brought to a pass where self-preservation, so to speak, demanded that the prisoner be silenced.

The situation was not unlike that which sometimes arises in deliberative bodies when it is sought by filibustering tactics to postpone action indefinitely. In the year 1893, in the United States Senate, in which the rule of the previous question has not been adopted, it was attempted by talking against time and obstructive methods in general to stave off Congressional action upon a matter of very great public interest. In the widespread discussion that was excited a number of eminent authorities on legal questions and parliamentary procedure—among them Judge Cooley—maintained that there was an unwritten law of first principles which, in case of necessity, would override positive rules and the law of custom. The argument was (in Judge Cooley's language) that "members of the majority should make the proper motions looking to definite and final action on the pending measure, and the presiding officer should recognize them, since only in that

way can the inalienable right of the Senate to express its will be exercised. If this is not done, upon an assumption that in some manner, by the action or non-action of the Senate, it has become impossible unless the minority assents, then the leading principle in representative government is, in one House of Congress, abrogated."

Similarly, if a prisoner by purely obstructive methods prolongs his trial indefinitely or makes a legal trial impossible, he may be forcibly restrained both as to voice and action. An embarrassment of the same kind arose in the trial of Guiteau, the assassin of President Garfield. It will be remembered that his noisy interruptions and perpetual rant, in defiance of the orders of the court, spun that trial out to great lengths and sometimes rendered it exceedingly difficult to proceed at all. Guiteau was tried on the assumption that he was sane and responsible. Upon such assumption it is believed that the court would have been justified in silencing him as was done with the prisoner in the English case.—*New York Law Journal*.

THE SHYSTERS' RICHEST FIELD.—In addition to a large amount of reputable business for respectable lawyers, the street railways afford the shysters of the legal profession the most profitable field for the utilization of the varied talents they derived from nature and have cultivated by habit. Working up fraudulent damage suits against these corporations has come to be the greatest of shyster specialties. It has grown with the increase of street railway mileage until it has attained immense proportions. That it will continue to expand, keeping pace with the territorial expansion of cities and outreaching of trolley lines, is not to be doubted.

Some weeks ago *The Post* discussed this shyster industry and its effects as revealed by abuses in the Cook County Hospital at Chicago. It was shown that the drummers for numerous law firms invaded the wards to which persons injured on the street railways were brought in such numbers as to seriously interfere with the work of the surgeons and nurses. They often arrived with the patients and succeeded in attending to their business before the doctors began an examination. This naturally induced the corporations to adopt similar methods, with the result that opposing counsel rallied around the beds of patients, one side trying to get up a damage suit for a contingent fee, the other side endeavoring to effect a settlement out of court. The situation finally became so intolerably disgraceful that a new warden of the hospital was appointed in order to effect a reform.

We find in the *Chicago Tribune* an editorial on fraudulent damage suits suggested by the experience of a railway corporation in another city. The *Tribune* cites the latest annual report of the Brooklyn Rapid Transit Company, showing that the enormous sum of \$990,000 was paid out in one year in settlement of damage suits and judgments against the company. To this amount the *Tribune* adds the \$260,000 spent by the company in maintaining its claims department and in fighting and adjusting these suits. The result, says the *Tribune*, is the amazing total of \$1,250,000, of which this one corporation is mulcted annually for real or alleged accidents. According to the statement of the company, only about \$100,000 of this amount represents claims that were absolutely legitimate; the balance stands for robbery. Making a reasonable allowance for self-interest on the part of the corporation, there is no doubt of the great success of the shysters. In Brook-

lyn, as in many other cities, these sub-stratum members of the great profession make a business of hunting up persons who have been injured in street cars, no matter how slightly, and of bringing damage suits against the company. The *Tribune* says:

"They employ a horde of 'ambulance chasers,' who make a living by pursuing persons supposed to have been injured in any way and securing their signatures to a paper authorizing a lawyer to bring suit against the company. Many of these suits are carried through by means of false witnesses. It is almost impossible to find a jury that will not find a verdict against a street railway company—such companies are always unpopular—and the result is that the traction companies are somewhat at the mercy of unprincipled lawyers.

"When a corporation is robbed of large sums annually in this way it is only too apt to fight fraud with fraud and resort to illegitimate methods to recoup itself. Finding it difficult to defeat dishonest claims in some fair way, it is tempted to resort to the bribing of jurors. Seeing no way of escaping the machinations of professional false witnesses, it hires false witnesses of its own to defeat just as well as unjust claims. Thus dishonest claimants and sharp lawyers breed a retaliatory crop of bribery and perjury. The Brooklyn Rapid Transit Company may be able to stand its heavy losses, but the people of New York cannot afford to have such a condition of things continue. Corporations which debauch juries should be punished, but the plundering of corporations of all kinds by fraudulent damage suits should be checked, if not stopped altogether."

New York is one of the States in which, according to the highest authority, unblushing and unpunished perjury is employed in a majority of the cases brought to trial by jury. Perhaps this is the most discouraging fact in the sociology of this country. The legal profession virtually controls this republic. It is the dominant factor in legislation, National and State, and it has sole charge of the courts of justice. Isn't it time for the upper strata of the profession—the thousands of honorable men who adorn its ranks and are leaders in thought and action—to give some attention to the abhorrent lower strata, the tricksters and suborners of perjury?—*Washington Post*.

DRUNKENNESS DEFINED.—Judge Henry S. Dewey, of the Boston Municipal Court, has recently given a judicial definition of "drunkenness," which is no doubt very pleasing to all Bostonians of a convivial turn of mind. It appears that ex-Alderman Michael W. Brick, of Boston, was arrested at a Democratic caucus, and was brought before Judge Dewey on the charge of drunkenness. There was testimony to the effect that Mr. Brick, on the night of the arrest, had smelled strongly of liquor; had staggered; had interfered with the proceedings of the caucus, by using profane and abusive language and by shoving people roughly about; had called policemen "lobsters," and had otherwise conducted himself in an unseemly manner. Judge Dewey, in disposing of the case, said: "I have never been called upon to make a ruling upon such a case. This is the proposition before me, leaving out the matter of aggravation. The only material testimony upon the part of the government as tending to show the defendant guilty of the crime of drunkenness was that he staggered and that his breath smelled of liquor; that he appeared excited, used indecent and profane language, and that his face was flushed. Leaving out the part relating to the flushed face and the profane and indecent language, the case in the rough brings up the proposition of his breath smelling of liquor and that he staggered. Now, whether that is suffi-

cient evidence to constitute the crime of drunkenness, only one State in the Union, Alabama, has attempted to define. The Century Dictionary defines the word—leaving out the synonyms—inebriated, overcome or frenzied by alcoholic liquor. The Law Dictionary gives it as being affected by strong drink. I think that when the law makes it a criminal offense for a man to be in a state of drunkenness, it means more than that which is found in the Law Dictionary. Most any man's mind is affected by a single drink, a single glass of liquor. It is preposterous to hold that the legislature intended it in that sense. In my practice in the courts I have used the definition found in the Century Dictionary—overcome, stupefied or frenzied by alcoholic liquor. There is a great difference in men when they have used such liquor. One man's mind will be clear and his legs unmanageable. Another man's mind will be stupefied, and he will be able to walk as at any time. The definition in the Century Dictionary, in my opinion, is a good, fair meaning of drunk under the law. I shall apply it to this case, and probably continue to do so until I get a better one. In the testimony of this case I am unable to find that the defendant was either overcome, stupefied or frenzied by having drunk alcoholic liquor. I order him discharged."

Since Judge Dewey's opinion was delivered considerable excitement has prevailed in and about Boston, the prohibition element being especially agitated over the matter. One other Boston judge, it is reported, has adopted the view of Judge Dewey, and a few days ago discharged forty-seven out of forty-nine men charged with intoxication. A dissenting voice, however, is raised by Judge John H. Burke, who, in pronouncing a prisoner guilty some days ago, said: "I have been asked if I would follow the recent decision in this court by one of my associates as to the crime of drunkenness, and I replied that I cannot. I find it just as easy to determine the question, 'Is a person drunk?' as it is to determine the question, 'Is he overcome?' The Century Dictionary gives me no aid or comfort. But giving full weight to the definition of 'drunk,' as given in the Century Dictionary, that is, 'overcome,' 'frenzied,' I think a reasonable interpretation of this is that he is 'overcome' who has surrendered the use or control of any of his faculties. If, therefore, a man is found staggering upon the street, and incoherent of speech by the voluntary use of intoxicating liquors, I should be required, as I view the law, to hold him as a 'drunk,' unless these conditions were explained away."—*Law Notes*.

[In 10 Am. & Eng. Enc. Law, 276 (which excellent work is doubtless on the shelves of our esteemed contemporary) will be found a collection of cases in which "drunkenness" is judicially defined.—EDITOR VA. LAW REGISTER.]

DAMAGES FOR MENTAL SUFFERING.—As a matter of principle, there is perhaps no good reason why the law should not allow damages for mental suffering caused by a wrongful act, when such suffering is unconnected with bodily injury, or physical contact. But by the great weight of authority recovery may not be had in such a case. Freedom from liability does not rest on the theory that no injury has been done, or that such mental disturbance may not follow the act as a probable consequence. Recovery is denied because distress of mind can be measured only by its physical effects; because it is impossible satisfactorily to administer any

other rule. The difficulty last named has been experienced in those jurisdictions which allow recovery for mental anguish caused by negligence in the delivery of telegrams. This doctrine has given rise in those States to a great mass of speculative litigation, and has just been cast aside as impracticable by the Supreme Court of Indiana, which has applied it during the past twelve years. *Telegraph Co. v. Ferguson*, 60 N. E. 675.

In cases where there is no immediate personal injury, but where bodily illness follows as a result of sudden fright, some of the objections urged against recovery for fright alone fall to the ground. It has often been held that an action may lie for damage done by an animal frightened by a negligent act apart from physical contact. 1 Beven on Negligence, 78. Yet in the leading case on that point it was held that there could be no recovery where a defendant's negligence caused reasonable terror, and illness ensued. *Ry. Com. v. Coultas*, 13 App. Cas. 222 (1888). This decision was handed down by the Judicial Committee and hence is not binding on the English courts. The doctrine announced has been repudiated in Ireland, *Bell v. G. N. Ry. Co.*, 26 L. R. Ir. 428 (1890), and has not been followed in the Queens Bench Division. *Wilkinson v. Downton* (1897), 2 Q. B. 57. In 1896 the rule of the *Coultas* case was adopted in New York, the court declaring that such injuries were too remote to be the subject of compensation. *Mitchell v. Rochester Ry.* 151 N. Y. 107. But inasmuch as the illness was directly traceable to the fright caused by defendant's act, the reason given is not wholly satisfactory.

In Massachusetts where damages for mental distress have been allowed in the case of a trespass upon a burying ground, *Meagher v. Driscoll*, 99 Mass. 281 (1868), or of an illegal eviction from leased premises, *Fillebrown v. Hoar*, 124 Mass. 580 (1878), the Mitchell case has been followed, the court limiting the application of the doctrine to cases of negligence. *Spade v. Lynn Ry.*, 168 Mass. 285 (1897). So in two recent New York cases the Appellate Division has held that the Mitchell case does not apply to wilful torts, and has given damages accordingly. *Preiser v. Weilandt*, 48 App. Div. 569; *Williams v. Underhill*, 63 App. Div. 224.

The soundness of this alleged distinction is not apparent. Whether a wrong be wilful or only negligent, the wrongdoer is liable for such injuries as flow naturally from his act. If damages for the results of mental distress caused by him are too remote in the one case, they must be so in the other. Moreover, if it is inconvenient to award damages for injuries resulting from shock or fright caused by a negligent act, it must be equally inconvenient when the act is wilful. The objection as to the encouragement of speculative litigation applies to both classes of cases. It may be that the disposition to give punitive damages has misled the courts and brought this confusion into their decisions.—*Columbia Law Review*.

[By a recent statute in Virginia, damages for mental anguish may be recovered of telegraph companies for negligent failure to deliver dispatches.—Acts 1899-00, p. 724.]

CONSTITUTIONAL LAW—APPEAL FROM EXECUTIVE TO JUDICIAL DEPARTMENT.—We print below a résumé of the briefs of counsel in the case of *Johnson v. Barham*, decided by the Virginia Court of Appeals in March, 1901 (3 Va. Sup. Ct. Rep. 167, 38 S. E. 136), and elsewhere referred to in this number, on the question (not noticed by the court as unnecessary to the decision) of the constitu-

tionality of a statute allowing an appeal to the corporation court from the action of a police board, in the removal from office of the chief of police. The question is an important one, involving as it may, the preservation of the policy of keeping the judicial and executive departments separate and distinct.

The proceeding was an original application to the Court of Appeals for a writ of prohibition to the corporation court.

Wyndham R. Meredith and William H. Sands, for the Petitioners.

1. The amendment giving the right to the chief of police, in case of his removal, to appeal from the decision of the board of police commissioners to the corporation court is anomalous. If there is any similar piece of legislation in relation to any other municipal charter we have been unable to find it.

2. The amendment is unconstitutional, because the discretionary power of appointment and removal, vested in the board of police commissioners, can in no wise be subjected to the revision or superintendence of the corporation court. Bill of Rights of Virginia, sec. 7, Constitution of Virginia, Art. II.

To be sovereign in its executive department there must exist no other authority to stay the execution of its judgments and decrees. Potter's Dwaris Stats. 334, 336.

Under our system of government—divided into three separate, distinct and co-ordinate branches—the legislative and judicial may exercise appointing power to offices peculiarly related and connected with the exercise of their constitutional functions, and to maintain their independent existence; that is to say, the general assembly may elect or appoint the officers of their respective branches, and relating to their department of government. Courts may appoint, administrators, guardians, masters, commissioners, and such officers as are necessary to the free and independent exercise of power conferred by the constitution, but the appointment of officers generally is naturally and properly an *executive* function. *State v. Denny* (Ind.), 21 N. E. 279, 254, 261; Letter of Thomas Jefferson to S. Kercheval, dated November 21, 1816; *Marbury v. Madison*, 1 Cranch, 153; *Taylor v. Commonwealth*, 3 J. J. Marsh, 401; *State v. Kennon*, 7 Ohio St. 561; Pomeroy Const. Law, sec. 643; Broom, Const. Law, 524; Federalist, page 47, 48; *City of Evansville v. State* (Ind.), 21 N. E. 273.

In *Burch v. Hardwick*, 23 Gratt. 51, the court says: "In investigating the conduct of the officers of the police force, and removing them from office, the mayor was discharging executive functions; to hold otherwise would be to confound the functions of the executive and judicial departments. Nor is the mayor, when acting as chief executive officer of the city, in any sense, or to any degree, the inferior of the corporation court, or anywise subject to its superintendence. They are distinct and co-ordinate departments of government, as much so as the executive and judicial departments of the State and Federal governments; and neither has the right to supervise or control the other in the discharge of their respective duties." *Ex parte Allen*, 26 Ark. 9, 13; *Logan v. Branch Bank*, 1 Ohio St. Rep. 432; 69 Conn. 576; 52 Central Law Journal, 162.

The power of removal is incident to the power of appointment. *Ex parte Bouldin*, 6 Leigh, 639; *Ledman v. Southerland*, 3 S. & R. 145; *Hoke v. Henderson*, 13 Peters, 230.

R. M. Lett and O. D. Batchelor, for Respondents.

1. The Act granting the appeal from the decision of the board of police com-

missioners to the corporation court is constitutional, since that board is not an executive body within the constitutional meaning of that term. *Virginia Constitution*, Art. V. sec. 23; *Id.* Art. VI. sec. 20; *Burch v. Hardwick*, 30 Gratt. 24, 33-35; *City of Baltimore v. Board of Police*, 15 Md. 376; *People v. Mahanel*, 13 Mich. 481; *People v. Draper*, 15 N. Y. 532; *Police Commissioners v. Louisville*, 3 Bush (Ky.) 597; *Diamond v. Kane*, 21 La. Ann. 309; *State v. Levy*, 21 Id. 538.

Since the board derives its being from the legislature its powers and functions are such as the legislature may confer, and are subject only to such limitations as the legislature may impose. *Cooley's Const. Lim.* (5th ed.), 135-138.

In our system, in opposition to the letter of the constitutional provisions under review, striking illustrations of the blending of the legislative, executive and judicial power in the same persons or bodies frequently exist, and it has not been, and will not be, supposed that our constitution intended to inhibit this. *Fox v. McDonald* (Ala.), 45 Am. St. Rep. 107; *Wheeling etc. Co. v. Paul* (W. Va.), 19 S. E. 551; *Marye v. Diggs*, 98 Va. 749; *Freeman's Note*, 13 Am. St. Rep. 125; *State v. Constantine* (Ohio), 51 Am. Rep. 833; *People v. Woodruff*, 32 N. Y. 364; *Walker v. Cincinnati*, 21 Ohio, 314; *Terre Haute v. Evansville etc. R. R.* (Ind.), 37 L. R. A. 189.

2. The powers exercised by the board of police commissioners under the charter of Newport News are judicial and not executive. *Bills v. Goshen*, 3 L. R. A. 261; *Dillon on Muncp. Corp.* 253; *Speed v. Detroit* (Mich.), 23 L. R. A. 842; *People v. Board of Police Com'rs*, 72 N. Y. 416, 447.

3. The power of removal is not necessarily vested in the department which has the power of appointment. *Ex parte Bouldin*, 6 Leigh, 639; *McDougal v. Guigon*, 27 Gratt. 133.

4. The instances in Virginia are numerous in which the legislature has conferred upon the courts the exercise of executive powers and functions, as well as upon executive officers, judicial or quasi-judicial powers. In the matter of elections, the appointment of the officers have been exercised by the courts. *McDougal v. Guigon* (*supra*); Va. Code, sec. 567.

5. The case of *Burch v. Hardwick*, 23 Gratt. 51, differs from the present case in that the mayor holds an office created by the constitution, whilst the board of police commissioners is the creature of the legislature.

6. The appeal allowed by the Act of January 17, 1900, gives an appeal of right, and is, in effect, merely a transfer of the case from the board of police commissioners to the corporation court, where it must be proceeded in *de novo*. *Leighton v. Maury*, 76 Va. 865; Va. Code, secs. 838, 839, 3453, 4107; *Charter of Newport News*, secs. 45 and 63.